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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

DENISE RACHELLE D'SANT ANGELO,

Defendant and Appellant.

2d Crim. No. B225609  
(Super. Ct. No. 1292430)  
(Santa Barbara County)

Denise Rachelle D'Sant Angelo appeals from the judgment entered after her conviction by a jury of grand theft. (Pen. Code, § 487, subd. (a).)<sup>1</sup> She was sentenced to prison for two years. Appellant contends that the trial court erroneously instructed the jury and excluded relevant evidence. In addition, she contends that (1) the trial court abused its discretion in denying probation, and (2) her two-year prison sentence constitutes cruel or unusual punishment under the California Constitution. We modify the judgment to impose mandatory fees omitted by the trial court and affirm the judgment as modified.

*Facts*

In 2007 three nuns resided at a Sisters of Bethany convent in Santa Barbara. In August or September 2007, the nuns were notified that the convent was going to be sold and that they would have to leave by the end of the year. Concerned citizens formed a committee with the goal of raising funds to provide housing in Santa Barbara for the nuns.

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<sup>1</sup> All statutory references are to the Penal Code unless otherwise stated.

During a meeting on October 12, 2007, appellant was appointed chairperson of the committee. At appellant's suggestion, the committee agreed that all donations would be sent to her business address.

In October 2007 appellant deposited into her personal checking account nine checks totaling \$2,800. All of the checks were donations payable to the Sisters of Bethany. The grand theft charge was based on these nine checks. On November 26, 2007, appellant's checking account was overdrawn.

Appellant testified that she was authorized to deposit the nine checks into her personal checking account to pay "the balance of the start up fees" for a nonprofit organization for the Sisters of Bethany. Appellant claimed that one of the nuns at the convent – Sister Angela – had expressly consented to the deposit.

*Alleged Refusal to Give Pinpoint Instruction*

The prosecution's theory was that appellant had committed grand theft by embezzlement.<sup>2</sup> Appellant contends that the trial court erroneously refused to give her proposed pinpoint instruction on good faith as a defense to embezzlement.<sup>3</sup> The instruction provided: "An individual who honestly and in good faith believes that she is authorized to appropriate and use money which she is accused of embezzling, lacks the fraudulent intent necessary to prove the crime. [¶] Lack of concealment may be considered by you as evidence of a good faith belief that the defendant was acting within the scope of her authority and as evidence of lack of fraudulent intent."

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<sup>2</sup> Embezzlement " 'is the fraudulent appropriation of property by a person to whom it has been entrusted.' (§ 503.) A conviction for embezzlement 'requires conversion of trusted funds coupled with the intent to defraud. [Citations.] An intent to deprive the rightful owner of possession even temporarily is sufficient and it is no defense that the perpetrator intended to restore the property nor that the property was never "applied to the embezzler's personal use or benefit." [Citations.]' [Citation.]" (*People v. Nazary* (2010) 191 Cal.App.4th 727, 742.)

<sup>3</sup> "A pinpoint instruction 'relate[s] particular facts to a legal issue in the case or "pinpoint[s]" the crux of a defendant's case, such as mistaken identification or alibi.' [Citation.]" (*People v. Ward* (2005) 36 Cal.4th 186, 214.) Appellant's proposed instruction pinpointed the theory of her case, which was that she had acted in good faith.

In arguing that the trial court refused to give her proposed pinpoint instruction, appellant cites page 413 of the Clerk's Transcript. This page contains the actual pinpoint instruction submitted to the court. Nothing on page 413 suggests that the trial court refused to give the instruction. The preceding page identifies the pinpoint instruction as an instruction "not given (refused, rejected or *withdrawn*)." (Italics added.) Thus, appellant has not shown that her proposed pinpoint instruction was refused or rejected. Appellant may have withdrawn it.

" 'A judgment or order of the lower court is presumed correct. All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown.' " (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) Accordingly, in the absence of contrary evidence, we must presume that appellant withdrew her proposed pinpoint instruction. There is no contrary evidence here. Appellant's withdrawal of the proposed instruction is supported by the record. Immediately before instructing the jury, the court declared: "I would like the record to reflect that the set of instructions . . . about to be given to the jury is a stipulated set of instructions from the parties. . . . Any exception to the stipulation will now be stated on the record." The court asked defense counsel if he wanted to state any exceptions to the stipulated instructions. Counsel replied, "No, your honor."

Even if the trial court had refused to give the pinpoint instruction, the court would not have erred because it was duplicative of other instructions given to the jury. (*People v. Panah* (2005) 35 Cal.4th 395, 486 ["A trial court is not required to give pinpoint instructions that merely duplicate other instructions"].) Pursuant to CALJIC No. 1806, the jury was instructed on good faith as a defense to embezzlement: "A good faith belief in acting with authorization to use the property is a defense. [¶] In deciding whether the defendant believed that she had a right to the property and whether she held that belief in good faith, consider all the facts known to her at the time she obtained the property, along with all the other evidence in the case. The defendant may hold a belief in good faith even if the belief is mistaken or unreasonable. But if the defendant was aware of facts that made that belief completely unreasonable, you may conclude that the belief was not held in good faith." The

court modified CALCRIM No. 1806 to incorporate verbatim the second paragraph of the pinpoint instruction, beginning with "Lack of concealment."

*Exclusion of Evidence that Appellant Returned Funds to Donors*

Some of the donors who had written the nine checks received refunds of their donations through cashier's checks dated October 31 and November 3, 2009. Appellant contends that the trial court erroneously excluded evidence of these refunds. Appellant offered the evidence to show that, when she deposited the nine checks into her personal checking account in October 2007, she did not intend to defraud anyone. She was allegedly "holding onto" the money instead of "taking [it] for her own use . . . . She was confused about what to do with it." The trial court excluded the evidence because it was not relevant. The court declared: "I don't see any tendency in reason for the evidence of what happened [in October and November 2009] to prove [appellant's] intent in October 2007."

"Evidence is relevant if it has any tendency in reason to prove or disprove any disputed fact or consequence, including evidence relevant to the credibility of a witness. [Citations.]" (*People v. Abel* (2012) 53 Cal.4th 891, 924-925.) " 'A determination of relevance . . . lies within the discretion of the trial court, and a reviewing court reviews that determination for abuse of discretion.' [Citation.]" (*People v. Livingston* (2012) 53 Cal.4th 1145, 1162.)

"Fraudulent intent is an essential element of embezzlement. [Citation.] Although restoration of the property is not a defense, evidence of repayment may be relevant to the extent it shows that a defendant's intent at the time of the taking was not fraudulent. [Citations.] Such evidence is admissible 'only when [a] defendant shows a relevant and probative link in his subsequent actions from which it might be inferred his original intent was innocent.' The question before us, therefore, is whether evidence that [appellant] returned the money reasonably tends to prove [s]he lacked the requisite intent at the time of the taking." (*People v. Sisuphan* (2010) 181 Cal.App.4th 800, 813.)

The donations were returned 10 months after the filing of the felony complaint in December 2008 and five months after the filing of the information in May 2009. Since the donations were returned long after criminal charges had been filed, evidence of their return

had no tendency in reason to prove appellant lacked fraudulent intent at the time of the taking. The trial court, therefore, did not abuse its discretion in excluding the evidence as irrelevant.

Our conclusion is supported by *People v. Edwards* (1992) 8 Cal.App.4th 1092. There, the defendant was charged with the theft of title to Reed's residence. Reed could not read. At defendant's urging and without knowing what he was signing, Reed signed a grant deed transferring title to defendant. After criminal charges were filed, defendant reconveyed title to Reed. The defendant claimed that the trial court had erroneously excluded evidence of the reconveyance. He argued that the reconveyance "bore on the question of whether he had the requisite intent at the time of the taking." (*Id.*, at pp. 1097-1098.) "The trial court ruled that the evidence was irrelevant because it did not speak to defendant's state of mind at the time of the taking." (*Id.*, at p. 1098.) The appellate court upheld the trial court's ruling: "Defendant reconveyed the title of the residence to Reed after he was arrested. Such evidence did not bear on the question whether defendant had a wrongful intent when the initial transfer was made; its only relevance was to demonstrate that Reed had been made whole with regard to ownership of his property." (*Id.*, at p. 1100.)

#### *Exclusion of Evidence that Undeposited*

##### *Checks Were Returned to Donors*

Appellant argues that the trial court erroneously excluded evidence that 26 checks received by appellant had not been deposited and were eventually returned to the donors who had written them. The trial court again did not abuse its discretion. No charges were filed based on these 26 undeposited checks. The grand theft charge was based on the nine checks that appellant had deposited into her personal checking account. The return of the 26 checks had no tendency in reason to prove that appellant lacked fraudulent intent when she deposited the nine checks. Moreover, in his offer of proof, defense counsel declared that the 26 checks were returned "at the direction of Steve Bauman or suggestion of Steve Bauman from the State Attorney General's Office."<sup>4</sup> Bauman, who was called as a witness by

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<sup>4</sup> Bauman was a supervising investigative auditor with the Charitable Trust Section of the Department of Justice of the Attorney's General Office.

appellant, testified that the first record of communication between his office and appellant was in April 2009, four months after the filing of the felony complaint. Thus, evidence of the return of the 26 checks was also irrelevant because they were returned after the filing of criminal charges.

*CALCRIM No. 1862*

Appellant maintains that the trial court erroneously gave CALCRIM No. 1862, which provides: "If you conclude that the People have proved that the defendant committed grand theft, the return or offer to return some of the property wrongfully obtained is not a defense to the charge." The court gave this instruction because in April 2009 appellant mailed to Steve Bauman a \$2,800 cashier's check. Appellant told Bauman "that she didn't know what to do with [these funds] because the church was no longer going to sell the [convent] and the specific purposes for which the funds were raised could no longer be fulfilled." Bauman returned the check to appellant because his office does "not accept charitable funds." In addition, appellant had returned \$1,000 to donor Rosemary Gutierrez in November of 2007. Appellant had previously deposited to her personal checking account a \$1,000 check from Gutierrez. Gutierrez's check was not one of the nine checks comprising the \$2,800 deposit on which the grand theft charge was based.

Appellant argues that the giving of CALJIC No. 1862 was erroneous because it "had the obvious effect of removing (or negating) the jury's consideration of the question of whether the return of the property, or the offer of the return, bore at all upon appellant's specific intent to steal at the time of the taking." Appellant forfeited this argument because she stipulated to the jury instructions as given. (*People v. Gallego* (1990) 52 Cal.3d 115, 195.) (4RT 836) In any event, the argument is without merit. The instruction did not preclude the jury from considering whether appellant's offer to return or actual return of funds bore on her intent to defraud. The instruction informed the jury that, if the People "proved that [appellant] committed grand theft [i.e., had the requisite criminal intent], the return or offer to return some of the property wrongfully obtained is not a defense to the charge." (CALJIC No. 1862.) This is a correct statement of the law. (*People v. Sisuphan*, *supra*, 181 Cal.App.4th at pp. 810-811 [intent to restore property at the time of the taking

coupled with timely restoration of the property (i.e., before the filing of criminal charges) does not constitute defense to embezzlement].)

### *Denial of Probation*

Appellant claims that the trial court abused its discretion in sentencing her to prison instead of placing her on probation. " 'The grant or denial of probation is within the trial court's discretion and the defendant bears a heavy burden when attempting to show an abuse of that discretion. [Citation.]' [Citation.] 'In reviewing [a trial court's determination whether to grant or deny probation,] it is not our function to substitute our judgment for that of the trial court. Our function is to determine whether the trial court's order granting [or denying] probation is arbitrary or capricious or exceeds the bounds of reason considering all the facts and circumstances.' [Citation.]" (*People v. Weaver* (2007) 149 Cal.App.4th 1301, 1311.)

The trial court's order denying probation did not exceed the bounds of reason. Its denial was reasonably based on the following factors: "The defendant was an active participant. [¶] The manner in which the crime was carried out demonstrates criminal sophistication. [¶] The defendant took advantage of a position of trust to commit the offense. The defendant has shown no remorse." The court also considered that it was "convinced beyond a reasonable doubt" that appellant had committed perjury during the trial. The court "stress[ed] that this last factor is considered . . . only on the issue of the defendant's prospects for rehabilitation and for no other purpose." A trial court's conclusion that a defendant committed perjury at trial may be considered in denying probation or fixing punishment so long as the consideration "is limited to [the perjury's] reflection upon the character of the defendant and his or her prospects for rehabilitation. [Citation.]" [Citation.]" (*People v. Aragon* (1992) 11 Cal.App.4th 749, 764.)

### *Cruel or Unusual Punishment*

Appellant maintains that her two-year prison sentence violates the prohibition against cruel or unusual punishment of Article I, section 17 of the California Constitution. "We decide whether the penalty given 'is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity' . . . ."

(*People v. Cunningham* (2001) 25 Cal.4th 926, 1042.) For the same reasons that the trial court did not abuse its discretion in denying probation, the two-year prison term is not disproportionate to appellant's crime.

*Failure to Impose Mandatory Fees*

The People correctly contend, and appellant does not dispute, that the trial court erroneously failed to impose a court security fee of \$30 (§ 1465.8, subd. (a)(1)) and a court facilities assessment of \$30. (Gov.Code, § 70373, subd. (a)(1).)<sup>5</sup> (RB 37-38)

*Disposition*

The judgment is modified to impose a \$30 court security fee (§ 1465.8, subd. (a)(1)) and a \$30 court facilities assessment. (Gov.Code, § 70373, subd. (a)(1).) As modified, the judgment is affirmed. The trial court shall prepare an amended abstract of judgment and send a certified copy to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P.J.

PERREN, J.

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<sup>5</sup> Section 1465.8, subdivision (a)(1) presently provides for a court security fee of \$40. But when appellant was sentenced in June 2010, the fee was \$30.



Jean M. Dandona, Judge  
Superior Court County of Santa Barbara

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